

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Library of Congress
Washington, D.C.

In re

**DETERMINATION OF ROYALTY
RATES AND TERMS FOR MAKING AND
DISTRIBUTING PHONORECORDS
(Phonorecords III)**

**DOCKET NO. 16-CRB-0003-PR
(2018-2022)**

**THE SERVICES' JOINT OPPOSITION TO THE COPYRIGHT OWNERS'
MOTION FOR CLARIFICATION OR CORRECTION OF
TYPOGRAPHICAL ERRORS AND CERTAIN REGULATORY TERMS**

Amazon Digital Services LLC (“Amazon”), Apple Inc. (“Apple”), Google Inc. (“Google”), Pandora Media, Inc. (“Pandora”), and Spotify USA Inc. (“Spotify”) (collectively, the “Services”) respectfully request that, with limited exceptions, the Copyright Royalty Judges (the “Judges”) deny the February 12, 2018 Motion for Clarification or Correction of Typographical Errors and Certain Regulatory Terms made by the National Music Publishers’ Association and the Nashville Songwriters Association International (together, the “Copyright Owners”). The exceptions are the areas of agreement identified in Attachment A.¹

Contrary to the name of their Motion, the Copyright Owners request far more than the “clarification” or “correction” of terms. Instead, the Copyright Owners seek to substantively rewrite the regulations in a manner that is inconsistent with the Judges’ January 27, 2018 Initial Determination (the “Determination”), unsupported by the record, and procedurally improper. The Copyright Owners’ Motion therefore should be denied except as set forth in Attachment A.

I. THE COPYRIGHT OWNERS’ MOTION IS PROCEDURALLY IMPROPER AND FAILS TO MEET THE APPLICABLE STANDARD.

Under the guise of seeking “clarification or correction,” and despite explicitly stating that they “do not request rehearing,” Mot. at 1, the Copyright Owners challenge the substance of the Judges’ Determination and rewrite terms that were thoroughly litigated, analyzed, and decided. The Copyright Owners’ Motion seeks to introduce terms that were never proposed by any party, have not been analyzed or litigated, and lack any basis in the record. While more aptly labeled a motion for rehearing, the Copyright Owners have styled their Motion as something else, presumably in an effort to help themselves to additional pages for their Motion, *compare* 37 C.F.R. § 350.3(c)(1) (“Motions must not exceed 20 pages...”) *with* § 353.2 (“A motion for

¹ The areas of agreement involve the definition of Play, the Family Plan proration provision, and the definitions of Applicable Consideration and Performance Royalties.

rehearing shall not exceed 10 pages in length...”), and to skirt the standard governing motions for rehearing—a standard that the Copyright Owners have not even attempted to meet.

Motions for rehearing are subject to a “strict standard,” *Order Denying in Part SoundExchange’s Motion for Rehearing and granting in Part Requested Revisions to Certain Regulatory Provisions*, Docket No. 14-CRB-0001-WR (2016-2020), at 2 (Feb. 10, 2016) (“SoundExchange Order”), and can be granted only upon a showing that any aspect of the Determination is erroneous. 37 C.F.R. § 353.1. The moving party must identify aspects of the Determination that are “without evidentiary support in the record or contrary to legal requirements.” 37 C.F.R. § 353.2. Critically, and as the Judges have previously ruled, a party may not use the rehearing process to seek a “second bite at the apple” by “present[ing] theories and arguments that could have been advanced earlier.” SoundExchange Order at 2.

The Copyright Owners’ Motion falls well short of this standard. The Motion makes no effort to establish that the Judges issued regulations that are inconsistent with either the evidentiary record or the law, and instead seeks a “second bite at the apple” by proposing substantive rule changes that could have been advanced and argued earlier. Specifically, the Copyright Owners now ask the Judges to (i) adopt a definition of “Service Revenue” that they never previously sought for during the hearing; (ii) accept certain per-subscriber minima that were explicitly rejected by the Judges; and (iii) make changes to the regulations with no support in the record. These are precisely the types of “second bites” that are inappropriate at this stage. Accordingly, the Copyright Owners’ requested substantive changes should be rejected.

II. MANY OF THE COPYRIGHT OWNERS' PROPOSED CHANGES SHOULD BE DENIED BECAUSE THEY ARE OVERREACHING AND INCONSISTENT WITH THE DETERMINATION.

A. The Judges Should Reject the Copyright Owners' Effort to Redefine Service Revenue for Bundles.

Far from being unintentional or inadvertent (as the Copyright Owners suggest), the Judges' definition of Service Revenue was based on the record, thoroughly analyzed by the Judges, and plainly deliberate. Apparently unhappy with the Judges' definition of Service Revenue, the Copyright Owners propose a new one that lacks any basis in the record and that was never proposed by any participant (let alone by the Copyright Owners themselves).² Their proposed definition, if adopted, would lead to unpredictable and potentially incongruous results.

First, the Copyright Owners incorrectly argue that the definition of Service Revenue “as it relates to bundles ... was not intended,” that this “was not explicitly discussed in the Determination,” and that its “adoption ... appears inadvertent.” Mot. at 11 & 12. But this definition was extensively litigated, and the Judges carefully weighed the evidence in the record on this point. Indeed, the Judges explicitly stated that they were “not persuaded by the Copyright Owners' revenue bundling arguments not to adopt a flexible, revenue-based royalty rate.” *Id.* at 22. Further, the Judges thoroughly considered the relationship between revenue and bundling, including by analyzing the *particular* bundles offered by the Service Providers. *See, e.g.*, Determination at 8 & n.22 (“For its music service offering, Amazon bundles interactive streaming at no additional cost with its Prime membership Google Play Music, launched in 2011, is bundled with the YouTube Red video service subscription.”); *id.* at 10 (discussing means of determining the payable royalty pool “[f]or subscription service offerings, whether

² The Copyright Owners did propose alternatives to terms the Services had proposed on issues such as ad-supported services in post-trial briefing, showing that the Copyright Owners could propose alternative terms when they wished to do so. Even there, the Judges rejected the Copyright Owners' “belated[]” proposal. *See* Determination at 52.

standalone or bundled”); *id.* at 15 (considering, and rejecting the “Copyright Owners argu[ment] that a transparent metric tied to actual usage is superior because, under the alternative percent-of-revenue approach, services might manipulate revenue through bundling”); *id.* at 20 (considering and rejecting argument that “the Services might obscure royalty-based streaming revenue by offering product bundles ... rendering it difficult to allocate the bundle revenue”); *id.* (citing testimony that “the existing rate structure accommodates these bundling, deferral, and displacement issues by the use of minima that are triggered if the royalty resulting from the headline percent-of-service revenue falls below the established minima,” and that “because the marketplace appears to be functioning, the alternative minimum rates must be adequately handling revenue measurement issues”).

Even if there were a basis for the Copyright Owners’ objections (and there is none), the definition that the Copyright Owners now proffer was never proposed or discussed at any point during the proceeding, and no analysis was ever conducted or provided to the Judges regarding the likely effects of the definition on either the Services or the market. Indeed, the Copyright Owners never proposed *any* definition of Service Revenue during the proceeding. *See* Determination at 89 (“Copyright Owners’ proposed per-unit rate structure obviates the need for a Service Revenue definition; consequently it does not include one.”). For example, it is possible that, under the Copyright Owners’ proposed revision of Service Revenue, the “revenue” calculated for purposes of the regulation could exceed the revenue realized or accounted for by a service. Such might be the case with third-party bundles, where the revenue from a discounted bundle might be split evenly between the service and a third-party, with the revenue received by the service being less than the actual standalone price of the music Offering. Had the Copyright Owners ever proposed during the proceeding a definition of Service Revenue for bundles as just

the standalone price of the Offering, then the Services would have had an opportunity to identify and expose this flaw in the definition. Therefore, the Copyright Owners' late-proposed definition of Service Revenue violates the basic requirement that a determination of the Copyright Royalty Judges "be supported by the written record." 17 U.S.C. § 803(c)(3). Moreover, the new definition now proposed by the Copyright Owners is explicitly contrary to the Judges' endorsement of the "classic price discrimination" enabled by "bundling strateg[ies]," Determination at 21, which the Judges recognized as "beneficial," *id.* at 34.

Nor is there any merit to the Copyright Owners' argument that the current definition "warrants revision to be consistent with ... the Judges' holdings in *Web IV* and the *SDARS* [I and III] proceedings." Mot. at 11. Those three proceedings involved different circumstances, different economics, different rights, different licenses, different industries, and (in the case of *Web IV*) a different legal standard, each of which makes them improper comparisons for evaluating the definition of Service Revenue here. Notably, in each of the three proceedings cited by the Copyright Owners, a single royalty metric was used to set rates (a percentage-of-revenue in both *SDARS* proceedings and a per-play rate in *Web IV*). Here, by contrast, the Judges adopted a greater-of royalty formula, in part because it explicitly addressed the revenue definition and bundling issues that the Copyright Owners now want addressed in a different fashion. *See, e.g.* Determination at 19-22. As a result, the interplay between Service Revenue and the royalty rate structure is fundamentally different here than in the *SDARS* and *Web IV* proceedings, rendering them improper for comparison on this point.

B. The Judges Should Reject the Copyright Owners’ Proposed Per-Subscriber Minima—Which They Have Misabeled “Floors”—for Locker Services and Limited Offerings.

Couched as addressing a purported “oversight,” Mot. at 7, the Copyright Owners propose rolling forward the existing all-in per-subscriber minimum royalty fees from the former Subpart C offerings: \$0.18 per subscriber for limited offerings and \$0.17 per subscriber for locker services. The Determination makes clear, however, that it is only the subscriber-based mechanical-only royalty *floors*, i.e., the per-subscriber rates applied *after* the deduction of performance rights royalty payments from the total royalty pool, that the Judges intended to remain in effect, *not* the per-subscriber minima. Determination at 1 (“The existing subscriber-based royalty floors shall remain in effect during the new rate period.”); *id.* at 36-37 (adopting a structure that calls for the greater of a percentage-of-revenue rate and uncapped TCC rate, and also retains the pre-existing Mechanical-Only floors, but does not incorporate a per-subscriber minimum). In a transparent effort to get around the removal of per-subscriber minima, the Copyright Owners misleadingly refer to the locker service and limited offering per-subscriber minima that applied *before* the deduction of performance rights royalty payments from the total royalty pool as “Floors.” The Judges should reject this obfuscation.

As the current regulations make clear, there have never been mechanical-only floors for locker services and limited offerings (such mechanical-only floors only applied to former Subpart B services). *Compare* 37 C.F.R. § 385.12 (setting forth the royalty payment methodology for former Subpart B services including a mechanical-only “floor”) *with* 37 C.F.R. § 385.22 (setting forth the royalty payment methodology for former Subpart C services without any mechanical-only floors and referring to a per-subscriber rate prong as a “minimum,” not a floor);

see also id. at § 385.23(a)(3)(ii)-4(ii) (referring to per-subscriber *minima*, not floors). As a result, there are no such floors to roll over.

Consistent with the absence of a mechanical-only floor for locker services and limited offerings in the extant regulations, the Copyright Owners do not actually propose to add one here. And there is no basis in the record to do so. Instead, and notwithstanding the misleading nomenclature in the Copyright Owners’ Motion, they propose to reinsert the per-subscriber minima for those service categories that applied *prior* to the deduction of performance royalties. *See* Copyright Owners’ Proposed Order at §385.22 (proposing to add per-subscriber minima to calculation of royalty pool in step 1); *but see* Mot. at 7 (referring to those minima as floors). Pandora, Amazon, and Spotify did propose maintaining the existing per-subscriber minima for limited offerings and locker services as part of their proposals, but the Judges did not adopt their proposals. The Copyright Owners offer no reason for reinserting per-subscriber minima for these service categories, but continuing to discard the other per-subscriber minima from the prior regulations that benefitted the Services. The Judges should reject this cherry-picking and the unnecessary and confusing conflation of the analytically distinct concepts of floor fees (which have never applied to limited offerings or paid locker services) and minima (which have).

C. The Judges Should Reject the Copyright Owners’ Proposed Definition of Licensed Activity.

Although the Services identified a similar issue regarding the definition of Licensed Activity in their February 12, 2018 Joint Motion for Rehearing to Clarify the Regulations (“Joint Motion for Rehearing”), the Copyright Owners’ proposal does not actually fix the problem. *See* Mot. at 3-4; Proposed Order Ex. A at 4; *see also* Joint Motion for Rehearing at 4. Although the Copyright Owners propose to remove new Subpart B products from Licensed Activity, their edited definition remains ambiguous because of the “including but not limited to” language.

Determination Ex. A at § 385.2. This language could be read to include not only new Subpart B, but also old Subpart C products and services—which would render the definition incompatible with other portions of the regulations.

For example, the “Bundled Subscription Service” prong in new § 385.29 references “Licensed Activity.” *Id.* at § 385.2. Retaining “including but not limited to” in the latter term renders this prong ambiguous and potentially incoherent because the definition of “Bundled Subscription Service” also references “products or services *subject to other subparts.*” *Id.* at § 385.29 (emphasis added). If the definition of Licensed Activity were left open to potentially include new Subpart B and old Subpart C products and services, then the addition of “subject to other subparts” would be meaningless. *All* subparts would be incorporated in Licensed Activity, and no such “other subparts” would exist.

As a result, it must be that the Judges did not intend to include both new Subpart B and old Subpart C products and services in the definition of Licensed Activity. Accordingly, the Judges should correct this ambiguity by adopting the language submitted in connection with the Services Joint Motion for Rehearing and reject the Copyright Owners’ proposal on this issue.

D. The Judges Should Reject the Copyright Owners’ Proposed Changes to the Definitions of Promotional Offering and Free Trial Offering.

The Copyright Owners argue that the changes to Promotional Offering and Free Trial Offering “appear inadvertent,” Mot. at 9, because the Determination “accept[s] the agreed definition in the extant regulations and the agreed zero rate for promotional streams.” Determination at 93. The Copyright Owners then conflate the “definition in the extant regulations” with the regulations themselves and propose rolling forward the entirety of Section 385.14. Mot. at 9-10. This proposal misunderstands both the reasoning of the Determination and the Judges’ stated goal of simplifying the regulations. Determination at 77, 89, & 93.

Immediately following the Copyright Owners' quoted language, the Determination discusses creation of new Subpart D, a separate subpart governing zero-rate products. Determination at 93. The Judges created new Subpart D because there is "a basis to distinguish promotional or other non-revenue producing service offerings from other revenue-producing offerings." *Id.* at 77. This finding expressly removes zero-rate products from old Subpart C, a change that can hardly be "inadvertent." Mot. at 3. Reverting to the complex and "admittedly long-winded" old Subpart C regulations is inconsistent with the Determination. *Id.* at 4.

Furthermore, the language used in the definition of Promotional Offering is nearly identical to old § 385.14(a)(1)(i), with minor wording changes consistent with the Judges' goal of redrafting the regulations in "simple English." Determination at 89. This "welcome improvement," Mot. at 10, should not fall victim to the Copyright Owners' generalized claims of harm. The Copyright Owners' assertion that the new regulations conflict with the new Subpart B and expand the scope of Promotional Offerings lacks any basis. Indeed, the Copyright Owners provide no explanation of either the conflict or the harm. *Id.* As such, the Judges should deny the Copyright Owners' Motion on this point in favor of the new regulations, subject only to correcting the apparent typographical errors noted in the Services' Joint Motion for Rehearing.³

E. The Judges Should Reject the Copyright Owners' Proposed Definition of Purchased Content Locker Service.

Although the Copyright Owners seek to alter the definition of "Purchased Content Locker Service," they fail to cite to any basis in the Determination for doing so. Mot. at 9. Instead, the Copyright Owners again try to characterize their proposed change as fixing an oversight by the Judges, claiming that additions to the regulations were "inadvertently migrated from the general *Locker Service* definition." *Id.* But including this new language squares perfectly with the

³ To correct an apparent inadvertent double negative, the Services jointly requested that the latter "no" be removed from the definition of Promotional Offering. Services' Joint Motion for Rehearing at 3.

Judges' intent as expressed in the Determination. The Judges differentiated locker services based on whether they generate revenue (Paid Locker Services) or are promotional and do not. Determination at 92 ("For Purchased Content Locker Services that do not generate revenue for the Service, no royalty should accrue."). Inclusion of the phrase "or is otherwise in possession of" in the regulations reflects the Judges' intent that all non-revenue generating locker services be royalty free, not just those that require the content to be "purchased from a qualifying seller."

F. The Judges Should Reject the Copyright Owners' Proposed Definition of Student Plan.

The Copyright Owners seek to alter the definition of "Student Plan," arguing that it is not limited to students. Instead, the Copyright Owners seek to replace the definition articulated by the Judges in favor of one that the Judges rejected. The definition the Judges promulgated simplifies the regulations, an improvement the Services support. In now seeking to modify the definition, the Copyright Owners do not argue that their proposed definition is the correct one in light of the Determination, but only that it is a definition some Services proposed. Indeed, the only substantive objection the Copyright Owners make to the promulgated regulation is that it is not limited to students. Although the Services suggest that no one could argue that "Student Plan" covers more than students, the Services do not object to the Judges adding the word "student" in a third place, such that the definition would read: "*Student Plan* or *Student Account* means a discounted subscription available to students on a limited basis by a Service." Adding "to students" addresses the issue the Copyright Owners complain of in a much more elegant way than the Copyright Owners' attempt to rewrite the entire definition.

CONCLUSION

For the foregoing reasons, the Copyright Owners' Motion therefore should be denied except as set forth in Attachment A.

Dated: March 5, 2018

Respectfully submitted,

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ATTACHMENT A

Attachment A

Pursuant to the direction in the February 21, 2018 scheduling order issued by the Copyright Royalty Judges, the National Music Publishers' Association ("NMPA"), the Nashville Songwriters Association International ("NSAI" and together with the NMPA, the "Copyright Owners"), Amazon Digital Services LLC ("Amazon"), Google Inc. ("Google"), Pandora Media, Inc. ("Pandora"), and Spotify USA Inc. ("Spotify" and together with Amazon, Google and Pandora, the "Services") (the Copyright Owners and the Services collectively, the "Moving Parties") have met and conferred through counsel with respect to areas of potential agreement regarding changes to the regulations attached to the Initial Determination the Copyright Royalty Judges issued on January 27, 2018. While the Moving Parties were not able to reach an agreement on every issue raised in their respective motions, agreement was reached on the following issues, which the Moving Parties respectfully request the Copyright Royalty Judges adopt as part of any revised regulations issued after the Copyright Royalty Judges have ruled on the Moving Parties' respective motions.

The Definition of Play

The Copyright Owners and the Services each sought modifications to the definition of Play contained in Section 385.2 to clarify how the definition would apply to tracks of less than 30 seconds in duration. The Moving Parties respectfully request that the Copyright Royalty Judges adopt the following definition, which the Moving Parties believe addresses their respective concerns in a manner consistent with the Initial Determination:

Play means (1) with respect to a track that lasts in its entirety 30 seconds or more, an Interactive Stream or play of a Limited Download of 30 seconds or

more and (2) with respect to a track that lasts in its entirety under 30 seconds, an Interactive Stream or play of a Limited Download of the entire duration of the track. A Play excludes Fraudulent Streams.

Family Plan Proration

The Copyright Owners and the Services each sought modifications to the provision in Section 385.22(b) addressing how a Family Plan subscription should be prorated for a partial month. In particular, the regulation¹ referenced an “end user,” but a Family Plan by its nature has multiple individual end users. The Moving Parties respectfully request that the Copyright Royalty Judges adopt language for this family plan proration provision clarifying that it shall be:

...prorated in the case of a Family Plan account that subscribed for only part of a calendar month.

The Moving Parties believe this addresses their respective concerns in a manner consistent with the Initial Determination.

The Definitions of Applicable Consideration and Performance Royalties

The Copyright Owners sought to add a definition of “Applicable Consideration” to the regulations, which the Copyright Owners argued was inadvertently omitted. The Services’ motion did not address this omission. The Services sought to delete the definition of “Performance Royalties,” which the Services argued was not used and that, if used, would incorrectly exclude a large portion of the performance royalties actually paid by the Services. The Copyright Owners’ motion did not address the definition of Performance Royalties.

As part of a compromise between the Moving Parties, the Copyright Owners have agreed that the Copyright Royalty Board should delete the definition of Performance Royalties and the

¹ For reference, the sentence in question is “A Family plan shall be treated as 1.5 subscribers per month, prorated in the case of a Family plan end user who subscribed for only part of a calendar month.”

Services have agreed that the Copyright Royalty Board should add a definition of Applicable Consideration. Accordingly, the Moving Parties respectfully request that the Copyright Royalty Judges make the following changes to the regulations:

Delete the definition of “Performance Royalty” in Section 385.2.

Add the following definition to Section 385.2:

***Applicable Consideration* means anything of value given for the identified rights to undertake the Licensed Activity, including, without limitation, ownership equity, monetary advances, barter or any other monetary and/or nonmonetary consideration, whether such consideration is conveyed via a single agreement, multiple agreements and/or agreements that do not themselves authorize the Licensed Activity but nevertheless provide consideration for the identified rights to undertake the Licensed Activity, and including any such value given to an affiliate of a record company for such rights to undertake the Licensed Activity. For the avoidance of doubt, value given to a copyright owner of musical works that is controlling, controlled by, or under common control with a record company for rights to undertake the Licensed Activity shall not be considered value given to the record company. Notwithstanding the foregoing, applicable consideration shall not include in-kind promotional consideration given to a record company (or affiliate thereof) that is used to promote the sale or paid use of sound recordings embodying musical works or the paid use of music services through which sound recordings embodying musical works are available where such in-kind promotional consideration is given in connection with a use that qualifies for licensing under 17 U.S.C. 115.**

Because these proposed changes were agreed by the Moving Parties as part of a compromise, the Moving Parties respectfully request that if the Copyright Royalty Judges are inclined to enter one of these changes, but not the other, the applicable party be given the opportunity to submit further written argument addressing the other party’s proposed changes.

Certificate of Service

I hereby certify that on Monday, March 05, 2018 I provided a true and correct copy of the Services' Joint Opposition to Copyright Owners' Motion for Clarification or Correction of Typographical Errors and Certain Regulatory Terms to the following:

Google Inc., represented by Ivana Dukanovic served via Electronic Service at idukanovic@kslaw.com

Johnson, George, represented by George D Johnson served via Electronic Service at george@georgejohnson.com

National Music Publishers Association (NMPA) et al, represented by Benjamin Semel served via Electronic Service at Bsemel@pryorcashman.com

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Signed: /s/ Stacey L Foltz Stark